

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

vs.

MOTOROLA, INC., and MOTOROLA
MOBILITY, INC.,

Defendants

Case No. 10-1823

**MICROSOFT'S OPPOSITION TO
MOTOROLA AND MOTOROLA
MOBILITY'S MOTION TO DISMISS**

Noted: Friday, January 7, 2011

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AND MOTOROLA MOBILITY'S MOTION TO
DISMISS
CASE NO. 10-1823

LAW OFFICES
DANIELSON HARRIGAN LEVY & TOLLEFSON LLP
999 THIRD AVENUE, SUITE 4400
SEATTLE, WASHINGTON 98104
TEL. (206) 623-1700 FAX. (206) 623-8717

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I. INTRODUCTION

This action arises out of breaches by Defendants Motorola, Inc. and Motorola Mobility, Inc. (collectively “Motorola”) of obligations they undertook to provide licenses to their purportedly “essential” or necessary patents on reasonable and non-discriminatory (“RAND”) terms. When Motorola chose to participate in the standard setting process for developing both the WLAN wireless internet standard and the H.264 video compression standard, it agreed to offer licenses on RAND terms to Microsoft and other prospective licensees for any patents Motorola claims are necessary to comply with the respective standards.

Motorola has identified a number of patents as allegedly essential or necessary to both the WLAN wireless standard and the H.264 video compression standard, but has not complied with its obligation to offer Microsoft a license to these technologies on RAND terms. Instead, Motorola has expressly conditioned any such license on an exorbitant, discriminatory, and unreasonable royalty. As the Complaint alleges, Motorola’s demand is not a good faith effort to comply with the obligations it undertook when participating in the standard setting process.

Specifically, Motorola has demanded that Microsoft pay it a royalty of 2.25 percent per unit, *based on the price of the end-product* (such as an Xbox 360, computer, phone, etc.); i.e., the royalty is not based on the value of the specific component containing Motorola’s allegedly essential patent, much less limited to the allegedly patented feature. This demand violates the commitment Motorola made to IEEE-SA, the ITU, and their members.

Motorola argues that this demand is simply the opening move in a negotiating minuet and that the Court should therefore disregard Microsoft’s allegation that this demand is not a good faith offer. But Motorola’s argument rests upon Microsoft having a contractual obligation to negotiate in response to a demand that—on this Motion—must be deemed to be made in bad faith (as alleged). No such possible duty to negotiate in good faith is triggered by a bad faith demand that is itself a breach of the contract. In fact, such a demand—which seeks

1 to impose terms far outside of the RAND playing field—strikes at the heart of the purpose of
 2 the RAND requirement. At best, it is a gambit designed to secure a negotiating advantage by
 3 abusing the power inherent in control over the patented technology. The proper response to
 4 this kind of abusive practice is not to succumb to it but to stop it.

5 On this Motion, Microsoft need not show that its allegation of Motorola's bad faith will
 6 be sustained at trial (though Microsoft does note that the royalty demanded is based on a value
 7 far in excess of that of the allegedly patented feature in question and is thus facially not
 8 RAND). Faced with an allegation of bad faith that must be deemed true, Motorola argues that
 9 the Court would be unduly burdened if it was required to make the ultimate determination of
 10 compliance with RAND. But this Court is well-equipped to determine whether Motorola's
 11 demand is within the range of RAND rates and terms or is a bad faith demand that constitutes a
 12 breach of contract, and this determination will be based on methods of analysis with which the
 13 Court is already familiar. For example, determining whether Motorola's royalty demands to
 14 Microsoft were reasonable and non-discriminatory under applicable precedent may entail, *inter*
 15 *alia*, evaluation of competing technologies under consideration by the relevant standards
 16 setting organization, other standards-related licenses proposed/entered into by Motorola and
 17 other parties participating in the relevant standard setting organization, and an evaluation of
 18 relative role of the accused technology in the accused products.¹ The Court can also readily
 19 determine what an appropriate RAND royalty rate is under the circumstances.

20 Motorola opted to participate in the standard setting process and committed to abide by
 21 those Standards Determining Organizations' ("SDOs") RAND obligations. Motorola does not
 22 dispute that its actions are governed by enforceable contracts formed with the SDOs and their
 23 members, including Microsoft, and Motorola does not dispute the relevant terms of those

24 ¹ See e.g., Francois Leveque and Yann Ménière, *Vagueness in RAND Licensing Obligations is Unreasonable for*
 25 *Patent Owners*, CERNA Working paper. Available at: <http://ssrn.com/abstract=1030520>; Daniel Swanson and
 William Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, And Control of*
Market Power, 73 Antitrust L.J. 1, 21 (2005). Declaration of Shane P. Cramer in Support of Microsoft's
 Opposition to Motorola and Motorola Mobility's Motion to Dismiss ("Cramer Dec."), Ex. 1-2.

1 contracts. Nonetheless, Motorola effectively seeks summary judgment that it has complied
 2 with those contracts. But, Motorola's demand contains terms that do not remotely meet RAND
 3 criteria, and alone demonstrates the genuine dispute between the parties, thereby fatally
 4 dooming Motorola's current motion. In any event, Microsoft has so alleged and has alleged
 5 that this breach by Motorola threatens to cause, and has caused, significant injury to Microsoft.
 6 Microsoft's complaint easily meets the low threshold for defeating this motion, which
 7 Microsoft respectfully requests be denied.

8 II. STATEMENT OF RELEVANT FACTS

9 The following facts must be accepted as true and construed in Microsoft's favor. *See*
 10 *NL Industries v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

11 A. The Standards Setting Process.

12 Standards play a critical role in fostering development of wireless and video coding
 13 technologies. Complaint, ¶ 23. Standards facilitate the adoption and advancement of
 14 technology as well as the development of products that can interoperate with one another. *Id.*
 15 Standards are beneficial. Companies that produce products compatible with a standard can
 16 design products by referencing only the standard documentation, without the need to
 17 communicate separately with every other company with which their products may need to
 18 interoperate. *Id.* Companies producing products that implement and are tested to a standard
 19 can be confident that their products will operate with other products that also are compatible
 20 with that standard. Consumers of those products can be confident that products from multiple
 21 vendors will work together as intended under the standard. *Id.*

22 The standards also confer potential power on patent holders. In order to assure that
 23 implementers of these standards will not be subject to abusive practices by patent holders, even
 24 those whose claims have no more than suspect legitimacy, SDOs have adopted rules that
 25 address the disclosure and licensing of patents that SDO participants may assert in relation to

1 the practice of the standard under consideration. *Id.*, ¶ 26. These rules, policies and/or
 2 procedures are set out in the intellectual property rights policies (“IPR policies”) of the SDOs.
 3 *Id.* IPR policies – including those at issue in this litigation – require participants claiming to
 4 own relevant patents to offer licenses for those patents to any implementer of the standard, and
 5 to do so on RAND terms. *Id.*, ¶ 27.

6 Such commitments are included in the IPR policies because they are crucial to
 7 developing such standards. *Id.*, ¶ 26, 28. Participants in standards development can craft
 8 standards knowing that an owner of a patented technology will not be permitted to abuse the
 9 resulting power by demanding unreasonable or discriminatory licensing terms. *Id.*

10 **B. Technologies at Issue in this Action.**

11 1. *The WLAN Wireless Internet Connectivity Standard.*

12 Motorola’s unlawful licensing demands pertain in part to patents that it claims are
 13 “essential” to a widely practiced standard for wireless Internet connectivity known as
 14 “WLAN,” “Wi-Fi,” and/or “802.11.” *Id.*, ¶ 29. WLAN enables an electronic device to access
 15 the Internet wirelessly at high speeds over short distances. *Id.*, ¶ 30. WLAN is based on a
 16 standard developed by the Institute of Electrical and Electronics Engineers (“IEEE”). *Id.*, ¶ 31.
 17 As a condition of participating in the standard setting process, Motorola agreed that “a license
 18 for a compliant implementation of the standard will be made available to an unrestricted
 19 number of applicants on a worldwide basis without compensation or under reasonable rates,
 20 with reasonable terms and conditions that are demonstrably free of any unfair discrimination.”
 21 *Id.*, ¶¶ 2-3, 43.

22 2. *H.264 Video Compression Standard.*

23 H.264 technologies provide video decoding in such applications as DVD players,
 24 videos available for downloading or replay on the Internet, web software, broadcast services,
 25 direct-broadcast satellite television services, cable television services, and real-time

1 videoconferencing. *Id.*, ¶ 34. H.264 technology was developed as a standard set of
 2 technologies at least in part through the auspices of the International Telecommunications
 3 Union ("ITU"). *Id.*, ¶ 36. As a condition of participating in the standard setting process,
 4 Motorola declared to the ITU that it was "prepared to grant a license to an unrestricted number
 5 of applicants on a worldwide, non-discriminatory basis and on reasonable terms and
 6 conditions." *Id.*, ¶¶ 4, 52.

7 **C. Motorola Voluntarily Participated in Setting the Relevant Standards.**

8 Motorola actively participated in the standard setting process for both the WLAN and
 9 H.264 standards, and induced the relevant SDO to include in each standard technology over
 10 which Motorola claims a patent. *Id.*, ¶¶ 37-54. Microsoft, IEEE, and ITU relied on Motorola's
 11 commitment that it would make licenses available to applicants on RAND terms. *Id.*, ¶¶ 56,
 12 60. In fact, IEEE's and ITU's decision to issue the standards despite Motorola's claim to have
 13 relevant patented technology inherently rested upon Motorola's commitment to offer any such
 14 technology on RAND terms. *Id.*, ¶¶ 44, 50. The reverse is also true. Had the SDOs been
 15 aware that Motorola would abuse its resulting power by demanding exorbitant royalties, the
 16 SDOs logically would taken a different technical path, and Motorola would not be the holder
 17 of allegedly essential patents. *Id.*

18 **D. Motorola has Breached its Contract with the SDOs and Microsoft by Refusing to**
 19 **Make Licenses Available to Microsoft on RAND Terms.**

20 In reliance on the commitments made by Motorola and other suppliers that they offer
 21 licenses for any patents they claimed were essential or necessary to implementation of the
 22 standards available on RAND terms, Microsoft began providing its WLAN and H.264
 23 capability in its Xbox 360 video game consoles, Windows 7 operating system, Windows Phone
 24 7, and other fields. *Id.*, ¶ 57.

1 Motorola breached its contracts with these SDOs and Microsoft by demanding unfair
2 and discriminatory terms for licenses of its identified patents. *Id.*, ¶ 78.

3 By letter dated October 21, 2010, Motorola “offer[ed] to grant Microsoft a worldwide
4 non-exclusive license under Motorola’s portfolio of patents and pending applications having
5 claims that may be or become Essential Patent Claims (as defined in section 6.1 of the IEEE
6 bylaws) for compliant implementation of the IEEE 802.11 Standards.” Declaration of Norman
7 H. Beamer in Support of Motorola, Inc. and Motorola Mobility, Inc.’s Motion to Dismiss
8 (“Beamer Dec.”), Ex. 1. Motorola said it would license the patents at a royalty rate of 2.25
9 percent per unit, calculated using the price of the end-product (Xbox, computer, smartphone,
10 etc.), as opposed to the component software, let alone the supposedly patented feature, itself.
11 *Id.*, Ex. 1, 2. These royalty rates are excessive, discriminatory, and “wholly disproportionate to
12 the royalty rate that its patents should command under any reasonable calculus.” Complaint,
13 ¶¶ 6, 65.

14 Motorola left the offer open for 20 days, and asked Microsoft to “confirm whether
15 Microsoft accepts this offer.” Beamer Dec., Ex. 1. Motorola did not indicate in the letter that
16 it would consider or negotiate other terms for licensing its portfolio. *Id.*

17 On October 29, 2010, Motorola sent another letter in which, on substantially the same
18 terms, it offered to grant Microsoft “a worldwide nonexclusive license under Motorola’s
19 portfolio of patents and pending applications covering the subject matter of ITU-T
20 Recommendation H.264.” Beamer Dec., Ex. 2. Again, Motorola stated that this offer would
21 be left open for 20 days, and asked Microsoft to “confirm whether Microsoft accepts this
22 offer.” *Id.* Motorola again did not indicate that it would consider or negotiate other terms for
23 licensing its portfolio. *Id.*

24 In these letters, Motorola discriminatorily chose Microsoft’s Xbox product line and
25 other multi-function, many-featured products and software, such as Windows 7, Windows

1 Phone 7, and products incorporating Microsoft software, for the purpose of extracting
 2 unreasonable royalties from Microsoft. Complaint, ¶ 65. Microsoft has alleged that, as a result
 3 of Motorola's breach, Microsoft has suffered (and will continue to suffer) significant injuries to
 4 its business and property, including lost profits, loss of customers and potential customers, and
 5 loss of goodwill and product image. *Id.*, ¶ 79.

6 III. LEGAL ARGUMENT

7 A. Relevant Legal Standards.

8 1. *Fed. R. Civ. P. 12(b)(6).*

9 In considering a motion to dismiss under Rule 12(b)(6), the court must construe the
 10 complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon*
 11 *Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded
 12 facts as true and draw all reasonable inferences in favor of the plaintiff. *Parks School of*
 13 *Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

14 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 15 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129
 16 S. Ct. 1937, 1949 (2009), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955
 17 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows
 18 the court to draw the reasonable inference that the defendant is liable for the misconduct
 19 alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks
 20 for more than a sheer possibility that a defendant has acted unlawfully." *Id.* In the event the
 21 court finds that dismissal is warranted, the court should grant the plaintiff leave to amend
 22 unless amendment would be futile. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

23 2. *Fed. R. Civ. P. 12(b)(1).*

24 Motorola has also moved to dismiss Microsoft's breach of contract claim as not yet
 25 ripe. "The basic rationale of the ripeness doctrine is to prevent courts, through avoidance of

premature adjudication, from entangling themselves in abstract disagreements.” *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (internal quotation marks omitted). A claim is ripe for adjudication where “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Principal Life Insurance Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005). As explained herein, Microsoft’s breach of contract claim became ripe as soon as Motorola demanded excessive and discriminatory royalties for its allegedly necessary patent claims.

B. Microsoft’s Breach of Contract Claim Should Not Be Dismissed.

1. *Microsoft has Stated a Claim for Breach of Contract.*

To state a claim for breach of contract under Washington law, a plaintiff need allege only (1) a valid contract, (2) a breach of a duty arising under that contract, and (3) resulting damage. *N.W. Indep. Forest Mfrs. v. Dep’t of Labor & Indust.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Microsoft’s complaint does so. Motorola has admitted for purposes of this motion that it has a valid contract with Microsoft. Motion at 2, n.2; *see also* Complaint, ¶¶ 75-76. Microsoft also alleged in some detail how Motorola has breached those contracts by failing to “offer licenses to its identified patents under reasonable rates, with reasonable terms, and on a non-discriminatory basis,” and has alleged that Microsoft suffered damages as a result of Motorola’s breach. *Id.*, at ¶78; *see also* ¶¶ 64-73. These allegations state a claim for relief under Rule 12(b)(6). Specifically, they state such a claim for breach of the RAND requirements.

In *Broadcom Corp. v. Qualcomm Inc.*, the Third Circuit analyzed the rationale for requiring that patent holders who participate in standard setting offer licenses on RAND royalty rates:

1 Firms may become locked into a standard requiring the use of a competitor's
 2 patented technology. The patent holder's IPRs, if unconstrained, may permit it
 3 to demand supracompetitive royalties. It is in such circumstances that measures
 4 such as FRAND commitments become important safeguards against monopoly
 5 power.

6 501 F.3d 297, 314 (3d. Cir. 2007).

7 A patent holder's failure to meet its RAND commitments by demanding excessive
 8 royalties gives rise to a breach of contract claim regardless of whether subsequent negotiation
 9 may produce a different offer. In *Research in Motion Limited v. Motorola, Inc.*, Research in
 10 Motion ("RIM") sued Motorola alleging, among other things, that Motorola had breached "the
 11 commitments Motorola made to IEEE and [another SDO] to license its essential patents on
 12 FRAND terms." 644 F. Supp. 2d 788, 791 (N.D. Tex. 2008). Motorola moved to dismiss
 13 RIM's complaint, arguing that all RIM had alleged was "that the two parties have not yet
 14 agreed to FRAND terms," and that "just because the parties have not yet settled on FRAND
 15 terms does not mean Motorola is unwilling to license the patent on FRAND terms." *Id.*, 644 F.
 16 Supp. 2d at 797. The court rejected this argument, finding:

17 RIM's complaint alleges that Motorola 'has refused to extend FRAND
 18 ...licensing terms to RIM for any of Motorola's purported essential
 19 patents...and has instead demanded of RIM terms that are unfair, unreasonable,
 20 and on information and belief, discriminatory.' Motorola's argument merely
 21 contradicts the factual accuracy of this statement. At this stage of the case, the
 22 court takes RIM's pleadings as true. RIM has adequately pled that Motorola did
 23 not honor its promise to license on FRAND terms. Motorola's contention
 24 otherwise is entitled to no weight on a Rule 12(b)(6) motion.

25 *Id.* (internal citations omitted). The *RIM* court's analysis applies with equal force here, and
 requires that the Court deny Motorola's motion.

Further, this analysis is clearly correct. Motorola's conduct is contrary to the
 fundamental purpose of the royalty requirements of the IEEE. In effect, Motorola argues that
 it can make an exorbitant, bad faith demand as the first step in a negotiating process—i.e.,
 Motorola argues that it can breach its duty to offer reasonable terms in order to gain an edge in

1 any negotiation. This conduct is the very abuse of power at which the IEEE standards are
 2 aimed. *See W.L. Gore & Assoc., Inc. v. Carlisle Corp.*, 529 F.2d 614, 623 (3d Cir. 1976)
 3 (noting that “[a] royalty demand which is so high as to preclude acceptance of a license offer
 4 is, after all, not appreciably different from a refusal to license upon any terms.”).

5 Microsoft’s response is precisely the correct response to such tactics—i.e., this action is
 6 designed to make such bad faith demands futile, to secure a declaration that Motorola’s
 7 conduct is in breach of its obligations, to enjoin such conduct and to recover for any resulting
 8 damage. Responding to a bad faith demand with a good faith offer would encourage further
 9 implementation by Motorola of the same strategy it is using here and apparently used in
 10 *Research in Motion*, 644 F. Supp. 2d at 797.

11 In the face of a complaint clearly stating a claim for relief, Motorola raises several other
 12 fact-based defenses that can be summarily rejected.

13 Motorola’s contention that Microsoft’s complaint should be dismissed because
 14 Motorola substantially complied with its RAND obligations presents a question of fact that is
 15 inappropriate for resolution on a motion to dismiss. *See Mike M. Johnson, Inc. v. County of*
 16 *Spokane*, 150 Wn.2d 375, 398, 78 P.3d 161 (2003) (recognizing that whether a party has
 17 substantially complied with contractual requirements is a question of fact). *Wapato Heritage,*
 18 *LLC v. U.S. Dep’t of Interior*, No. cv-08-177-RHW, 2008 WL 5046447 (E.D. Wash., Nov. 21,
 19 2008), cited by Motorola, holds likewise. In *Wapato Heritage*, the court granted a defendant’s
 20 motion for summary judgment after weighing all of the evidence presented by the parties and
 21 finding that the plaintiff had not substantially complied with contract requirements for
 22 exercising an option to extend a tribal lease. Motorola’s bald assertion that it substantially
 23 complied “with any RAND obligations” simply contradicts (in a conclusory manner that would
 24 not even raise a fact question on summary judgment) Microsoft’s specific factual allegations to
 25

1 the contrary. The argument cannot sustain a motion to dismiss. *Research in Motion*, 644 F.
 2 Supp. 2d at 797.

3 Motorola's remaining argument, that Microsoft breached its supposed obligation to
 4 negotiate in good faith with Motorola before filing suit, must also be summarily rejected. First,
 5 Motorola's argument presupposes that Motorola had not breached its obligations by making a
 6 bad faith offer on non-RAND terms. Microsoft owed no obligation to make a good faith
 7 proposal in response to a bad faith offer constituting a breach of the contract at issue. *See, e.g.*,
 8 *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 9-10, 221 P.3d 913 (2009) (a party's
 9 material breach of its contract excuses the other party of its obligation to perform). In this
 10 case, Motorola's demand for non-RAND terms is precisely the evil at which the RAND
 11 requirements were aimed. At most this argument raises the same basic fact issue at the heart of
 12 the case: whether Motorola's demand was on RAND terms.

13 2. *Microsoft's Breach of Contract Claim is Ripe for Adjudication.*

14 As noted above, the ripeness doctrine requires only that there be a substantial
 15 controversy between the parties that is immediate and real, as opposed to abstract or
 16 hypothetical. *Scott*, 306 F.3d 662; *Principal Life Ins.*, 394 F.3d at 669. There is nothing
 17 abstract or hypothetical about Microsoft's breach of contract claim. It is not contingent on any
 18 future occurrences.

19 Microsoft alleges that Motorola demanded non-RAND terms as a condition of licensing
 20 its technology and that doing so breached Motorola's contract obligations with resulting
 21 damage. Its demand was unequivocal, undisputed and, as alleged, unfair, discriminatory and in
 22 bad faith. These allegations facially satisfy applicable ripeness criteria. *Putz v. Golden*, No.
 23 C10-0741JLR, 2010 U.S. Dist. LEXIS 129411, **25-26 (W.D. Wash., Dec. 7, 2010) (J.
 24 Robart) (case was ripe for adjudication where plaintiff had alleged a breach of contract and
 25 resulting damage); *see also BrowserCam Inc. v. Gomez, Inc.*, No. 08-02959 WHA, 2008 U.S.

1 Dist. LEXIS 82159, **18-19 (N.D. Cal., Sept. 26, 2008) (claim for breach of contract was ripe
 2 where plaintiff alleged that defendant breached contract and that plaintiff was damaged as a
 3 result).

4 The primary question to be resolved is whether Motorola's offer was reasonable and
 5 non-discriminatory. Several courts have recognized their role in determining whether a party's
 6 offer satisfies its obligation to offer RAND royalty rate. *See, e.g., Broadcom Corp.*, 501 F.3d
 7 at 314 n.8; *Ericsson Inc. v. Samsung Electronics Co., Ltd.*, No. 2:06-CV-63, 2007 U.S. Dist.
 8 LEXIS 29257 (E.D. Tex., April 20, 2007); *ESS Tech., Inc. v. PC-Tel, Inc.*, No. C-99-20292
 9 RMW, 2001 U.S. Dist. LEXIS 26348 (N.D. Cal., Nov. 28, 2001). Factors in resolving this
 10 issue may include competitive technologies at the time of the relevant standard setting events,
 11 other licenses granted under the same or similar SDO intellectual property rights requirements,
 12 and the relative import of the accused features in the accused products when considered in the
 13 context of alleged innovation and other licensed products. *See e.g., Cramer Dec., Ex. 1; Ex. 2,*
 14 *at p. 21.*

15 Contrary to Motorola's argument at footnote 10 of its Motion, even outside of the
 16 RAND context, royalty rates generally may be based on the price of the end product only
 17 where "the patent-related feature is the 'basis for customer demand.'" *Lucent Technologies,*
 18 *Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336 (Fed. Cir. 2009) *citing Rite-Hite Corp. v. Kelley Co.*,
 19 *56 F.3d 1538* (Fed. Cir. 1995) (emphasis supplied). As Microsoft alleges, none of the patents
 20 at issue here enables Microsoft's end-products' core functionalities; each end-product could
 21 operate without Motorola's allegedly patented technology, making a royalty based on the price
 22 of the end-products unreasonable and inappropriate. Complaint, ¶¶66-69. Moreover, even if it
 23 were appropriate to measure the royalty based on the price of the end-product as opposed to the
 24 specific patented feature, the royalty demanded by Motorola here was manifestly excessive.
 25 *See Lucent*, 580 F.3d at 1338 (noting that when determining the proper royalty rate for a patent

1 allegedly used by a feature of Microsoft's Outlook email program, "[t]he district court
2 implicitly recognized that any damages computation based on the value of the entire computer
3 using common royalty rates (e.g., 1-5%) would be excessive.").

4 Motorola committed to the IEEE that its licenses would "be made available to an
5 unrestricted number of applicants on a worldwide basis without compensation or under
6 reasonable rates, with reasonable terms and conditions that are demonstrably free of any unfair
7 discrimination." Complaint, ¶¶ 2-3. Likewise, Motorola declared to the ITU that it was
8 "prepared to grant a license to an unrestricted number of applicants on a worldwide, non-
9 discriminatory basis and on reasonable terms and conditions." *Id.*, ¶ 4. Implicit in each of
10 these agreements was Motorola's obligation to act in good faith. *Badgett v. Sec. State Bank*,
11 116 Wn.2d 563, 569, 807 P.2d 356 (1991) ("There is in every contract an implied duty of good
12 faith and fair dealing."). Yet now Motorola appears to argue that its only obligation is to make
13 an offer, no matter how unreasonable, and that such a bad faith offer triggers a duty on the part
14 of Microsoft either to accede or to start negotiations in an arena defined by the bad faith offer.
15 Motion at 6 (arguing that "Motorola's opening offer—no matter how unacceptable" cannot
16 create a justifiable controversy ripe for resolution by this Court).

17 Motorola has not cited any case law holding a) that Microsoft had a duty to negotiate in
18 the face of an exorbitant royalty demand such as the one made by Motorola here or b) that the
19 failure to respond to a bad faith offer defeats ripeness. The IEEE-SA and ITU policies are to
20 the opposite effect. They require a RAND offer. A breach by Motorola does not trigger a duty
21 on Microsoft's part to perform; it excuses any such duty. An exorbitant, discriminatory offer
22 without more is a clear breach of Motorola's duties and epitomizes the abuse the standards are
23 designed to prevent. It changes the negotiating playing field—and is obviously designed to do
24 so. In fact, Motorola admits that such egregious royalty demands are its "standard" approach.
25

1 This dispute is ripe under the applicable legal standards. This lawsuit is the appropriate
 2 response to Motorola's apparently standard tactic of seeking to use the power conferred by the
 3 standards to demand excessive royalties and then negotiate from that improper position.

4 Microsoft is entitled to start the negotiations from an offer that meets the RAND requirements.

5 Further, Motorola's offer letters are not, on their face, anything other than demands
 6 setting forth the conditions on which Motorola is willing to "grant Microsoft a worldwide
 7 nonexclusive license under Motorola's portfolio of patents and pending applications" to certain
 8 technologies. Beamer Dec., Ex. 1, 2. Both letters specifically state that Motorola would
 9 "leave this offer open for 20 days," and asked Microsoft to "confirm whether Microsoft
 10 accepts the offer." *Id.* Nothing in either letter suggested that Motorola was willing to offer
 11 licenses on more favorable terms. Their import was the opposite.

12 Motorola had an obligation to offer licenses to its purportedly essential or necessary
 13 patent portfolios to Microsoft on RAND terms. It failed to do so. There are no future
 14 contingencies upon which Microsoft's claims depend. This dispute is fit for adjudication.²

15 3. *Microsoft does not seek an Advisory Opinion.*

16 Microsoft is not seeking an advisory opinion as Motorola contends. A court's
 17 determination of whether a party has violated its obligation to offer RAND royalty rates does
 18 not necessarily require a ruling on whether the patent-holder's claimed patents are "essential."
 19 *Ericsson*, 2007 U.S. Dist. LEXIS 29257 at **4-6; *Nokia Corp. v. Qualcomm, Inc.*, No. 06-509-
 20 JJF, 2006 U.S. Dist. LEXIS 61383 (D. Del., Aug. 29, 2006).

21 _____
 22 ² Motorola argues in passing that Microsoft anticipatorily breached the parties' contract by filing this suit. But,
 23 anticipatory breach is a question of fact that cannot be determined at this stage. *VersusLaw, Inc. v. Stoel Rives,*
 24 *L.L.P.*, 127 Wn. App. 309, 321, 111 P.3d 866 (2005) ("The question of anticipatory repudiation is one of fact and
 25 can be decided on summary judgment only 'if, taking all evidence in the light most favorable to the non-moving
 party, reasonable minds can reach only one conclusion.'") (internal citations omitted). Moreover, the contention
 lacks merit since, as alleged by Microsoft, Motorola's bad faith offer excuses any otherwise required reciprocal
 performance unless and until Motorola cures its breach. In any event, the Court should disregard Motorola's
 argument, as it is based on an unpublished Washington case, *Dequillettes v. Moffat*, 2004 Wash. App. LEXIS 283
 (Mar. 1, 2004). Unpublished Washington appellate court decisions have no precedential value. RCW 2.06.040.

1 In *Nokia*, the court remanded a plaintiff's complaint alleging that the defendant violated
 2 its obligation to offer RAND royalty rates because it did not raise substantial federal issues of
 3 patent law. The court found that "resolution of this claim depends on interpretation of the
 4 terms of the licensing agreement, rather than interpretation of the patents." 2006 U.S. Dist.
 5 LEXIS 61383 at *6. In *Ericsson*, the court granted a motion to separately try the parties'
 6 RAND dispute before trying the parties' patent disputes. The court, relying on *Nokia*,
 7 recognized that a RAND dispute "standing alone, implicates no substantial question of federal
 8 patent law," and that trying the RAND issues first might "alleviate many of the primary
 9 differences" between the parties. 2007 U.S. Dist. LEXIS 29257 at **6-7.

10 Here, just as in *Ericsson* and *Nokia*, the Court's determination of whether Motorola has
 11 violated its obligation to offer RAND royalty rates is not dependent on a determination that the
 12 underlying patents are essential. The Court's order will be enforceable just as any other order
 13 entered by the Court would be. Motorola's motion should be denied.³

14 **C. Microsoft's Remaining Claims Should Not Be Dismissed.**

15 1. *Microsoft Is Entitled to Plead and Prove Promissory Estoppel in the Alternative*
 16 *to its Breach of Contract Claim.*

17 At this stage of the pleadings, before the Court formally rules on the merits of any of
 18 Microsoft's claims, Microsoft's promissory estoppel claim is proper even though accompanied
 19 by a breach of contract claim (Complaint, ¶¶ 81-87). The claim cannot at this point be
 20 dismissed on the ground that "promissory estoppel applies only when no valid contract exists."
 21 Motorola Mot. at 9 (citing Washington cases).

22
 23 ³ Further, as Motorola noted in its motion, it filed a complaint for patent infringement against Microsoft in the
 24 Western District of Wisconsin, *Motorola Mobility, Inc., et anon. v. Microsoft Corporation*, No. 10-cv-700 (W.D.
 25 Wisc.), on November 10, 2010 relating to the same patents at issue here. Microsoft filed motions to dismiss or
 transfer that case to this district on December 21, 2010. If the Wisconsin court grants Microsoft's motion,
 Motorola will be required to litigate its patent infringement claims before this Court, likely as part of this suit.

1 Microsoft is entitled to allege, in the alternative, all causes of actions that the factual
 2 proof may ultimately support. Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more
 3 statements of a claim or defense alternatively or hypothetically"); 8(d)(3) ("A party may state
 4 as many separate claims or defenses as it has, regardless of consistency"); Wash. Civ. R. 8(a)
 5 ("Claims for Relief. . . . Relief in the alternative or of several different types may be
 6 demanded").

7 In *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 111 P.3d 1992 (2005), the court
 8 reversed a summary judgment dismissing the plaintiff's breach of contract claim, and held the
 9 evidence presented issues of fact not only as to that claim *but also* his alternative claims of
 10 promissory estoppel and negligent misrepresentation. *Id.*, 111 P.3d at 1201-1202. The court
 11 held all three claims "may be presented at trial." *Id.* at 1202. Similarly, in *Farm Crop Energy,*
 12 *Inc. v. Old National Bank of Wash.*, 109 Wn.2d 923, 750 P.2d 231 (1988), the Washington
 13 Supreme Court held the trial court should have fully instructed the jury on both alternative
 14 claims of breach of a loan agreement and promissory estoppel. The court explained that even
 15 if the jury concluded the defendant was not liable for revoking the loan agreement, "the jury
 16 could still find that [the plaintiff] changed position in reliance on [defendant's statements] and
 17 award damages pursuant to a promissory estoppel theory." 750 P.2d at 932. Microsoft is
 18 entitled to plead and present evidence on both its breach of contract and promissory estoppel
 19 claims. Neither claim may be dismissed at this stage.

20 2. *Microsoft Has Validly Pleaded Waiver as a Basis for Injunctive Relief.*

21 Motorola misreads Microsoft's cause of action based on waiver (Complaint, ¶¶ 88-91),
 22 arguing that waiver can be a defense only, not a cause of action (Motorola Mot. at 10).
 23 However, Microsoft's waiver allegation is a predicate for a claim; it is not advanced as an
 24 independent claim. Microsoft alleges waiver as the basis for a claim for injunctive relief. As
 25 alleged, Motorola waived any right it might otherwise have to make an opening demand for

1 exorbitant royalties in its declarations to IEEE and to the ITU. Complaint, ¶¶ 89-90. Microsoft
 2 alleges that it justifiably relied on this waiver and that, unless the Court enjoins Motorola from
 3 demanding the prohibited compensation, Microsoft will be irreparably harmed. *Id.* ¶ 91.
 4 Those allegations state a valid claim for injunctive relief, and must be viewed in the light most
 5 favorable to Microsoft. *See Livid Holdings, supra*, 416 F.3d at 946.

6 3. *Microsoft's Declaratory Judgment Claim May Not Be Dismissed at the*
 7 *Pleading Stage.*

8 Motorola misconstrues Microsoft's claim for declaratory judgment (Complaint, ¶¶ 92-
 9 95), and cites inapposite authorities, in arguing that that claim should be dismissed because it
 10 merely seeks a declaration of liability for damages sought in other claims. Motion at 10. First,
 11 the claim does not seek a declaration of liability for damages. It seeks a determination that
 12 Motorola is wrongfully seeking to withhold a license to its patents except on bad faith terms in
 13 breach of its commitment to the IEEE-SA Standards Board and the ITU. Complaint, ¶ 93.

14 Second, as explained above with respect to the promissory estoppel claim, at this stage
 15 of the pleadings Microsoft may advance alternative theories of relief.

16 Third, that a claim for declaratory relief "is merely a counterpart of" a party's other
 17 causes of action is not a valid objection. Motion at 10. The Declaratory Judgments Act
 18 provides that, "[i]n a case of actual controversy . . . any court of the United States . . . may
 19 declare the rights and other legal relations of any interested party seeking such declaration,
 20 *whether or not further relief is or could be sought.*" 28 U.S.C.A. § 2201(1) (emphasis added).
 21 Rule 57 of the Federal Rules of Civil Procedure similarly states, "[t]he existence of another
 22 adequate remedy does not preclude a declaratory judgment that is otherwise appropriate."⁴
 23 Here there are good reasons for the Court to include in the relief awarded a declaration that

24 ⁴ See also RCW 7.24.010 ("Courts of record within their respective jurisdictions shall have power to declare
 25 rights, status and other legal relations whether or not further relief is or could be claimed."); Wash. Civ. R. 57
 ("The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it
 is appropriate.").

1 Motorola's conduct was in bad faith and a breach of its obligations, and to order the conduct
 2 stopped, especially in light of the indications that this abusive conduct is standard operating
 3 procedure for Motorola.

4 In *Powell v. McCormack*, 395 U.S. 486, 517-18, 89 S. Ct. 1944 (1969) (citations
 5 omitted), the U.S. Supreme Court held that "[t]he availability of declaratory relief depends on
 6 whether there is a live dispute between the parties, . . . and a request for declaratory relief may
 7 be considered independently of whether other forms of relief are appropriate." The Court
 8 stated that a declaratory judgment can "be used as a predicate to further relief, including an
 9 injunction." *Id.* at 498-99.

10 Microsoft's claims for injunctive and declaratory relief are highly appropriate under the
 11 circumstances. In any case, Microsoft is entitled to plead claims for both monetary and
 12 declaratory relief. The Ninth Circuit has held that declaratory relief must be considered even
 13 when monetary relief is sought, in part because "declarations can serve an important
 14 educational function for the public at large as well as for the parties to the lawsuit." *Greater*
 15 *Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987), *citing*
 16 *Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). In *Zolin*, deaf persons challenged a
 17 county court's refusal to provide interpreters that would enable them to serve as jurors. The
 18 Ninth Circuit explained in *Zolin* that where a plaintiff is subjected to unlawful conduct,
 19 declaratory relief may be considered even if monetary relief is ultimately determined to be
 20 unavailable. The court added, "[s]uch [declaratory] relief might be appropriate as a vindication
 21 of plaintiffs' position and as a public statement of [such persons'] rights It may even
 22 forestall future litigation." *Id.* at 1113.

23 The Ninth Circuit's reasoning applies here, where many companies other than
 24 Microsoft are in fact likely to be subjected to Motorola's "standard" approach to royalty
 25 demands, and where Motorola's position has already been rejected in the *Research in Motion*

1 case. Declaratory relief is highly appropriate to set a clear “standard” that demanding non-
 2 RAND terms in order to tilt the negotiating field is not a permissible tactic. Among those who
 3 would benefit in the future from such a declaration is Microsoft itself.

4 The two unpublished district court decisions on which Motorola relies (Motion at 10)
 5 do not support dismissal of Microsoft’s declaratory relief claim at the pleading stage.
 6 Motorola cites *Degenhart v. AIU Holdings, Inc.*, No. C10-5172RBL, 2010 U.S. Dist. LEXIS
 7 125524 (W.D. Wash., Nov. 26, 2010), where plaintiffs’ insurer paid the cost of repairs for
 8 damage from an auto accident, and plaintiffs then sued to recover the diminished value of the
 9 vehicle. Plaintiffs sought damages for breach of their insurance contract, and also pleaded a
 10 claim for declaratory judgment that would describe the process by which those breach of
 11 contract damages are determined and paid. *Id.* at *4. Judge Leighton stated that the claim
 12 “mirrored” the relief sought in the plaintiff’s other claims, and cited *Swartz v. KPMG LLP*, 476
 13 F.3d 756, 766 (9th Cir. 2007) (holding court may dismiss a declaratory relief claim that merely
 14 “seeks a declaration of defendant’s liability for damages sought in the plaintiff’s other causes
 15 of action”). Judge Leighton nevertheless denied the motion to dismiss as premature since it
 16 would not alter the course of the litigation, and denied it without prejudice.

17 In this case, by contrast, Microsoft’s declaratory relief claim does not merely seek a
 18 declaration of liability for past damages. Microsoft alleges ongoing wrongful conduct that
 19 threatens imminent and substantial future harm for which declaratory relief may be the only
 20 effective remedy. *See, e.g.*, Complaint, ¶ 79. Microsoft also seeks a declaration of a royalty
 21 that would be consistent with Motorola’s commitments. *Id.*, ¶ 9.

22 Nor does *Permpoon v. Wells Fargo Bank Nat’l Ass’n*, No. 09-CV-01140-H (BLM),
 23 2009 U.S. Dist. LEXIS 89723 (S.D. Cal., Sept. 29, 2009), support Motorola’s motion. The
 24 court, on motions to dismiss, first determined that plaintiff’s complaint failed to state a claim
 25 for fraud, breach of fiduciary duty, or breach of the covenant of good faith and fair dealing, and

1 dismissed each of those claims. *Id.* at *3-5. Based on those rulings, the court dismissed
2 plaintiff's claim for declaratory relief because it was "entirely commensurate with" the relief
3 sought in the other claims that the court had dismissed on the merits. *Id.* at *5. The decision
4 would be pertinent here only if the Court were first to determine that Microsoft's factual
5 allegations and causes of action failed to state any theory of liability. And, as noted above, the
6 declaratory relief Microsoft seeks is not "entirely commensurate with" its other causes of
7 action.

8 III. CONCLUSION

9 Microsoft's complaint states a claim for relief against Motorola and is ripe for
10 adjudication. For the reasons set forth herein, Microsoft respectfully requests that the Court
11 deny Motorola's motion to dismiss.

12 DATED this 3rd day of January, 2011.

13 DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

14
15 By 

16 Arthur W. Harrigan, Jr., WSBA #1751
17 Christopher Wion, WSBA #33207
Shane P. Cramer, WSBA #35099

18 T. Andrew Culbert, WSBA #35925
19 David E. Killough, WSBA #40185
MICROSOFT CORPORATION
20 1 Microsoft Way
Redmond, WA 98052
21 Phone: 425-882-8080
22 Fax: 425-869-1327
23
24
25


1 David T. Pritikin, *Pro Hac Vice*
2 Richard A. Cederoth, *Pro Hac Vice*
3 Douglas I. Lewis, *Pro Hac Vice*
4 John W. McBride, *Pro Hac Vice*
5 SIDLEY AUSTIN LLP
6 One South Dearborn
7 Chicago, IL 60603
8 Phone: 312-853-7000
9 Fax: 312-853-7036

10 Brian R. Nester, *Pro Hac Vice*
11 Kevin C. Wheeler, *Pro Hac Vice*
12 SIDLEY AUSTIN LLP
13 1501 K Street NW
14 Washington, DC 20005
15 Telephone: 202-736-8000
16 Fax: 202-736-8711

17 Counsel for Plaintiff Microsoft Corp.

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Philip S. McCune and Lynn M. Engel at Summit Law Group, PLLC.


Linda Bledsoe